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No. 205

In the

Supreme Court of the United States

OCTOBER TERM, 1961

J. W. FREE,

Petitioner,

v.

JAMES F. BLAND

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the estate of a deceased wife may have a claim for reimbursement or reconvention against the estate of the surviving husband under the community property laws of Texas, where the husband has used his community funds to purchase United States savings bonds in the names of himself "or" his wife without her knowledge or consent, so that upon her death the bonds become his property as owner under Treasury Regulations.

STATEMENT

During their marriage, J. W. Free purchased U. S. Savings bonds with community funds of himself and his wife, without her knowledge or consent, in the names of himself "or" his wife. Thereafter, Mrs. Free died and Respondent Bland duly qualified as her executor. He was also named sole legatee under her will.

Petitioner Free brought suit for a declaratory judgment as to all rights concerning the bonds. Respondent filed a cross-action asserting that he owned a one-half interest in the bonds or, in the alternative, that he was entitled to a money judgment against Petitioner for reimbursement or reconvention to the wife's half of the community because of the purchase of the bonds with community funds.

The District Court did not sustain Respondent's claim of the ownership of a one-half interest in the bonds, but on the other hand rendered judgment for Petitioner Free, "adjudging him to be the owner of the U. S. Government Bonds sued for herein"; it was specifically ordered, adjudged, and decreed "that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the U. S. Government Bonds." However, the District Court did go on to render a money judgment in favor of Respondent for a sum equal to half the money value of the bonds in repayment or reconvention to the wife's half of the community estate because of the use of the community funds for the purchase of the bonds.

The intermediate appellate court, the Court of Civil Appeals, affirmed the judgment of the trial court declaring Petitioner Free to be the owner of the bonds and awarding the title and possession to him, but reversed the money judgment awarded to Respondent against Petitioner.

The Supreme Court of Texas reversed the latter portion of the judgment of the Court of Civil Appeals, and reinstated and affirmed the entire judgment of the trial court, the awarding of title and possession of the bonds to Petitioner Free and the awarding of a money judgment to Respondent Bland against Petitioner for one-half their money value.

The judgment of the District Court, as affirmed by the Supreme Court of Texas, was in accordance with the alternative pleadings of constructive fraud asserted by Respondent in his cross-action as follows:

> "Pleading in the alternative, Cross Plaintiff says that should he be mistaken in his allegations that he is the owner of a one-half interest in said bonds, together with interest thereon, then he says that said bonds, having been purchased by the said J. W. Free without the knowledge or consent of his then wife, Ida Free, with community funds, same having been acquired by J. W. Free and Ida Free, during the time they lived together as husband and wife, and as the result of their joint labors, depleted the community estate and funds of the said J. W. Free to the extent of the purchase price of the said bonds, and that by reason thereof, and the facts hereinabove alleged, the community estate of the said J. W. Free and Ida Free should be reimbursed in the event J. W. Free is decreed to be the owner of said bonds, to the extent of one-half (½) of the community funds used by the said J. W. Free in the purchase of said bonds."

We do not agree that any federal question was raised by Petitioner in the proceedings in the state courts, and particularly none is raised in the pleadings in the District Court upon which all subsequent proceedings were necessarily based.

ARGUMENT

The present case does not warrant intervention by the Supreme Court of the United States on certiorari. The constitutional powers of the United States are not challenged or endangered, and indeed no substantial federal question is presented, nor is the judgment here in conflict with the cases cited by Petitioner.

The courts of Texas here have determined the ownership and right to possession of the bonds in full accord with the Treasury Regulations and gave judgment for the title to and possession of the bonds to Petitioner Free, the surviving co-owner. The right of reimbursement of the community for the use of community funds without the knowledge or consent of the wife is clearly a matter of local law which does not affect and should not concern the Treasury Department, even if its regulations be regarded as determinative of the property rights of ownership as well as the Treasury Department's recognition of ownership and payment of proceeds.

It may well be doubted that the Treasury Regulations seek to establish control over the rights between estates of husband and wife for reimbursement or adjustment for the use of funds belonging to both. Indeed the wording of the Regu-

lations is in terms of recognition by the Treasury Department. Thus it is stated in 31 C.F.R., Sec. 315.5, that the form of registration "will be considered as conclusive" by the Department, that it will treat the ownership and interest to be as shown. Again the provision in Sec. 315.20 is that no judicial determination "will be recognized" by the Department that would defeat the right of survivorship. Again in Sec. 315.61 it is stated that the survivor "will be recognized" as a sole and absolute owner, immediately going on to say: "Thereafter payment or reissue will be made as though the bond were registered in the name of the survivor alone."

Certainly when title, ownership, and right to possession are recognized and held to be in the survivor, the mere allowing by the state court under state community property law of a claim for reimbursement of the community for community funds used in the purchase by the husband, without the consent and knowledge of the wife, does not tend to destroy or even hamper the borrowing power of the government of the United States. It is merely a matter of accounting between the private interests of the community partners for funds expended.

There is no clash here between the applicability of state and federal law, and there is no conflict between this decision and the cases cited by Petitioner. Those cases deal merely with the recognition of ownership, and the judgment here is entirely in accord with them in recognizing title and the right to possession in the survivor and awarding the same to the survivor. Those cases do not deal with the right of reconvention or reimbursement to the wife's community interest for

her half of the community funds used in the purchase. The judgment here is not based upon what the Petitioner terms the "mere convenience of the United States" interpretation of Treasury Regulations, but is entirely consistent with regarding those regulations as controlling the title and ownership and merely finds that a debt arises under the community property law of Texas in the way of a right to reimbursement for the use of the wife's half of their community funds, as part of the accounting between the community interests.

Illustrative of the fact that recognition of a right of reimbursement, a constructive or resulting trust, or an equitable lien is something apart from and not in conflict with recognition of absolute title in a surviving co-owner is the 1960 case of *Levites v. Levites, 169 N. E. 2d 574*. Even in this non-community property state of Illinois, which further had a state statute conferring absolute title on the survivor of co-owners, it was recognized that there was no conflict between absolute title on one hand and the possibility of a constructive trust or other claim on the other hand:

> "Notwithstanding the sweeping effect of the federal regulations and Section 2 of the Illinois Joint Rights and Obligations Act which confer absolute title to the bonds to surviving co-owners or death beneficiaries, it is evident that when cases with special facts are presented a constructive or resulting trust may be impressed against the bonds, such as where a thief steals a person's money and purchases bonds and they can be traced, where bonds are purchased by one spouse with the joint funds of both and the purchaser wrongfully names himself and other persons as co-owners, or where one spouse uses his funds to purchase bonds and places them in the name of himself and others as co-owners in violation of an agreement to make joint and reciprocal wills."

Another pertinent 1960 case is *In Re Chase's Estate, 348 P. 2d 473*, where the court states:

> "The treasury regulations providing for the ownership of the title of United States savings bonds in the surviving co-owner, will not preclude the courts from permitting others to pursue the proceeds, and the court will not hesitate to impose a constructive or resulting trust on the proceeds in order to achieve a fair result in cases of fraud or inequitable conduct. Anderson v. Bendson, D. C. Neb. 117 F. Supp. 765; Chase v. Leiter, 96 Cal. App. 2d 439, 215 P. 2d 756; Olsen v. Olsen, 189 Misc. 1046, 70 N. Y. S. 2d 838; Katz v. Driscoll, 86 Cal. App. 2d 313, 194 P. 2d 822; In Re Hendricksen's Estate, 156 Neb. 463, 56 N. W. 2d 711; In Re Haas' Estate, 10 N. J. Super. 581, 77 A. 2d 523."

The opinion recognizes the majority view that title vests in the surviving co-owner but goes on to point out that this does not prevent the existence of equitable claims and declares:

> "Our exhaustive review of the authorities leads us to the belief that while the treasury regulations provide a convenient method of determining ownership of the title to the bonds, those regulations are not intended to determine absolutely the equitable title to the proceeds thereof; accordingly the surviving co-owner upon the death of the other registered co-owner named on the face of the bond, becomes the absolute owner of the legal title to the bond, and under the said treasury regulations the United States will recognize only the surviving owner to whom, under the contract evidenced by the bond, it is obligated to make payment. Particularly, does this follow in the light of 31 C.F.R. § 315.15 which provides that the registered form of the bond, which must express actual ownership thereof, will be considered as conclusive of such ownership, the exceptions, in such section of the regulations referred to, not having application herein."

A very pertinent case is *In Re Schubert, 63 NYS 2d 27*, where partnership funds were used to purchase U. S. Savings bonds in the names of the two partners as co-owners. It was held that upon the death of one of the partners, the bonds in the possession of the representative of his estate should be delivered up to the surviving partner, as the surviving co-owner; the court went on to declare, however, that if it were true that a co-partnership existed between the co-owners and that the bonds were purchased by partnership funds and belonged to the co-partnership, their value would doubtless be taken into account in an action for an accounting pending in another court. There is of course a strong analogy between a partnership and the community of husband and wife in a community property state, and what the judgment actually does here is merely to take into account the use of community funds in the purchase of the bonds in an accounting between the respective community interests of the spouses.

In *Moore v. Brodrick, 123 F. S. 108, affirmed 226 F. 2d 105*, the federal court held that in the case of registration of U. S. savings bonds in the names of the decedent and his daughter as co-owners, "The contract between the Government and the purchaser of government bonds fixes legal title to the bonds for the purpose of protecting the Government against suits involving title but does not and should not affect other legal rights of third parties or change settled rules of law not necessary to effectuate its purpose." It further commented: "If the father had purchased the bonds with traceable stolen funds, would it be said that the contract and regu-

lations fixing title in the daughter prevented recovery from her by the owner of the funds?" It is noteworthy that the opinion cites and does not consider itself contrary to *Leman v. Foulston, 219 P. 2d 388*, one of the cases Petitioner claims to be in conflict with the present decision.

Silverman v. McGinnes, 259 F. 2d 731, recognizes that the Treasury Regulations have the force of law and that their language is broad, then goes on to say, "But the question to be faced is whether these regulations include not only the rights of the holder of the bonds as against his Government, the debtor, but also whether they determine the rights of individual citizens arising against each other out of transactions with these government bonds." After citing various state cases, it continues:

> "We think the distinction established in these state cases and others does not rest on fraud, although fraud was present in some of them. The point is that with regard to payment by the issuer, the United States Government, the provisions of the contract including the regulations, govern. But the regulations do not apply to individual rights of persons who under the state law of property have become equitably entitled to the proceeds."

Anderson v. Benson, 117 F. S. 765, holds that while under the Treasury Regulations the form of registration of bonds is conclusive of ownership, nevertheless a claim against the proceeds may be recognized without violating such regulations. The court states that it "is not in a position to, or would it, order the parties to request the United States to do other than what it agreed to do under the provisions of its contract, the terms of which are expressed in the bonds, and the stat-

utes and regulations pursuant to which they were issued. However, the Government satisfies its obligation by paying the proceeds in accordance with the terms of its contract to the named beneficiary. There is nothing in the law or regulations which prevent this Court from declaring a resulting trust in the proceeds of the bonds in order to prevent the perpetration of a fraud."

The only cases which deal with the right of reimbursement for the use of community funds, rather than ownership and the right to possession of the bonds, are in accordance with the judgment here. Such a case is *Slater v. Culpepper, 64 So. 2d 234;* there as here judgment was affirmed which recognized and decreed that the survivor was the owner of the bonds but also decreed on the reconventional demand that there be recovery of one-half of their value in reimbursement for the use of the community funds.

Petitioner declares that there is no question of actual or constructive fraud because the Court of Civil Appeals said so. However, that court was reversed by the Supreme Court of Texas, and it is apparent that the idea of constructive fraud was a consideration to it, and Respondent in the state proceeding expressly raised and pressed the contention of constructive fraud. Thus the very Application for Writ of Error states: "Where the husband purchased the bonds, and dies first, and the wife then obtains the full benefit of the transaction, then no question of fraud, either real or constructive, could arise on the part of the wife toward the husband. But in a case such as this, while Petitioner was not in a position

to even allege much less prove actual fraud, a constructive fraud had actually been perpetrated upon her". The opinion by Justice Walker in the *Hilley* case, particularly in the light of his dissent in *Ricks v. Smith*, show a concern with the idea of constructive fraud in the situation where the wife dies first, and of course this particularly arises in a situation, where, as here, the wife had no knowledge or consent to the use of the community funds. Respondent's pleadings stated such facts forming the basis of constructive fraud.

As this Honorable Supreme Court of the United States said in *Bank of America National Trust and Savings Association v. First National Bank in Indiana, 352 U. S. 29, 1 L. Ed. 2d 93:*

> "Securities issued by the Government generate immediate interests of the Government. These were dealt with in Clearfield Trust and in National Metropolitan Bank v. United States, 323 U. S. 454, 89 L. Ed. 383, 65 S. Ct. 354. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern."

The Supreme Court of Texas did not consider state law controlling over federal law, but rather found no conflict between them, and indeed, there is none. Moreover, the re-

stricted question here is not one which would be important to all the multitude of owners of United States bonds nor even all those with the particular form of registration used here, or even all of those with that form of registration in community property states. It arises only when such bonds are purchased by the husband with community funds, without the knowledge or consent of the wife, in a community property state, with this form of registration, where the wife dies first, and where the local law gives a right of reimbursement.

The decision of the Supreme Court of Texas does not deny effect to the Treasury Regulations but enforces them fully, awarding title, ownership, and the right to possession to Petitioner. The Treasury Department has no proper concern with the accounting between community interests for the funds which happen to have gone into the purchase of bonds, nor does such accounting present any federal question.

It is therefore respectfully submitted that this case is not a proper one for intervention by certiorari on the part of this Court, and that Writ of Certiorari should be denied.

Dated this ..... day of ....., 1961.

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APPEARANCE AND CERTIFICATE OF SERVICE

I, Royal H. Brin, Jr. hereby request the Clerk to enter my appearance as counsel for Respondent, and as one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, I hereby certify that on the day of , 1961, I served true and correct copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari upon Petitioner by depositing the same in the United States Post Office with first class postage, prepaid and addressed to Gerhard A. Gesell, 701 Union Trust Building, Washington 5, D. C. and Edwin M. Fulton, Box 500, Gilmer, Texas, attorneys for Petitioner.

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Attorney for Respondent